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No. 00-152

In the Supreme Court of the United States

ARTHUR S. LUJAN, LABOR COMMISSIONER OF CALIFORNIA, ET AL., PETITIONERS

v.

G & G FIRE SPRINKLERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

California's Labor Code includes provisions requiring workers on publicly funded construction projects to be paid no less than the prevailing rates determined by the State's Labor Commissioner. The Code specifies that, if a prime contractor or one of its subcontractors fails to pay its workers the specified wages, the amount of the underpayment plus penalties must be withheld from contract payments to the prime contractor on the project. A prime contractor subject to such withholding may, in turn, withhold the same amounts from contract payments to any subcontractor that has failed to pay its employees the prevailing wage. Respondent, a subcontractor that has been subject to withholding by prime contractors on three public works contracts, filed this action against various state officials, seeking a declaration that the withholding procedures violate due process. The questions presented are:

1. Whether respondent is deprived of a protected property interest, for Fourteenth Amendment Due Process Clause purposes, when a prime contractor withholds from respondent contract payments because of respondent's alleged failure to pay its employees the prevailing rate as required by respondent's contract.

2. Whether respondent has shown state action such that the alleged deprivation may be fairly chargeable to the State.

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INTEREST OF THE UNITED STATES

This case concerns the constitutionality of provisions of California law that authorize state agencies to withhold payments from prime contractors on public works projects where a subcontractor fails to pay the mandated prevailing wages to its employees, and that permit the prime contractor, in turn, to withhold similar sums from the subcontractor. A number of federal statutes require employees on federally funded projects to be paid the prevailing wage and authorize federal officials to withhold underpayments from the contractor. See Davis-Bacon Act, 40 U.S.C. 276a *et seq.*; Service Contract Act, 41 U.S.C. 351 *et seq.*; 29 C.F.R. 5.1(a) (1998) (collecting related statutes). Although the court of appeals stated that its holding would not extend to the Davis-Bacon Act because of the Department of Labor's "extensive hearing and appeal structure," Pet. App. A37 n.11, the United States has an interest in whether, and in what fashion, constitutional due process requirements apply to government contract activities and the withholding of payments pending resolution of compliance disputes.

STATEMENT

1. For over a century, States have sought to ensure that workers employed on the public works projects they fund, like workers employed on similar private projects, are paid the locally prevailing wage for their labor. See, *e.g.*, *Atkin* v. *Kansas*, 191 U.S. 207, 208 (1903) (addressing 1891 Kansas statute). Congress adopted such a requirement in 1931. Davis-Bacon Act, ch. 411, 46 Stat. 1494, 40 U.S.C. 276a *et seq.* California's prevailing wage statute dates from 1937, and is patterned on the Davis-Bacon Act. See *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 319 (1997); Pet. App. A37 n.11.

Under the California Labor Code, workers on "public works" projects must be paid "not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed." Cal. Lab. Code § 1771; see *id.* §§ 1720 (defining public works).[1] The required prevailing wages are set by the Director of the Department of Industrial Relations. *Id.* § 1773. The obligation to pay no less than the specified rates extends both to the prime contractor, which has a direct contractual relationship with the contract-awarding body, and to any subcontractors the prime contractor hires. *Id.* § 1774.

When a prime contractor or its subcontractor fails to pay an employee the required prevailing wage, the prime

[1] Certain provisions of the California Labor Code were altered effective January 1, 1998. Because respondent seeks only prospective relief (a declaratory judgment and an injunction)—and is precluded by the Eleventh Amendment from using this suit to obtain an award of money from the State Treasury for past wrongs, see *Green* v. *Mansour*, 474 U.S. 64, 72-73 (1985)—we believe that the current version of the California Labor Code is relevant for present purposes. See *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414 (1972) (where plaintiff seeks prospective relief, Court "must review the judgment * * * in light of [the] law as it now stands"). Where the Code has changed over time, we have attempted to indicate whether we are citing the pre-1998 or the current version.

contractor "forfeit[s]" a penalty of up to $50 per calendar day (or portion thereof) per affected worker. Cal. Lab. Code § 1775 (West 1989 & Supp. 2000). In addition, the difference between the prevailing wage and the amount actually paid must "be paid to each worker by the [prime] contractor"; and every public works contract must contain a stipulation to that effect. *Ibid.*[2] State law, moreover, expressly provides that, "[b]efore making payments to the contractor of money due under a contract for public work," the contracting agency "shall withhold and retain therefrom" the amount of any prevailing wage underpayments by the contractor *or* its subcontractor, plus penalties, as provided by law and the "contract for public work." *Id.* § 1727. Where money is withheld from a prime contractor on account of a subcontractor's failure to pay prevailing wages, California law makes it "lawful" for the prime contractor, in turn, to withhold like amounts from payments otherwise due to the subcontractor. *Id.* § 1729; see Pet. App. A22; Pet. 5. Contracting agencies generally may not withhold payments under Section 1727 "without a full investigation by either the Division of Labor

[2] Section 1775 was amended in 1998 to revise, among other things, the provisions regarding a subcontractor's failure to pay prevailing wages. See Pet. App. A115-A119; Cal. Lab. Code § 1775 (West Supp. 2000). The amended section provides: where the subcontractor fails to pay prevailing wages, the amount of underpaid wages shall be paid to the employees by either the contractor or the subcontractor (*id.* § 1775(a)); in order to avoid liability for the subcontractor's actions, the contractor must monitor the subcontractor's performance and take corrective action (including withholding funds from the subcontractor) if the prime contractor becomes aware of the subcontractor's failure to pay the wages (*id.* § 1775(b)); the contractor must withhold payments from the subcontractor if the Division determines that the subcontractor did not pay prevailing wages and the contract-awarding agency did not retain sufficient money to pay the employees (*id.* § 1775(c)); and, to the extent there is insufficient money due a contractor to cover all penalties and unpaid wages, the contractor and subcontractor are jointly and severally liable for the amount of the shortfall in any collection action brought by the Division, although collection efforts are to be brought first against subcontractors (*id.* § 1775(d)).

Standards Enforcement" or the contracting agency, except with respect to the final contract payment. Cal. Lab. Code § 1729.

If a contracting agency withholds payments from a prime contractor under Section 1727, the "contractor or [its] assignee" may bring suit against the awarding body to recover withheld wages and penalties. Cal. Lab. Code § 1733. Such a suit must be brought "within the 90-day period" following the "completion of the contract and the formal acceptance of the job" by the contracting agency, *id.* §§ 1730-1733, and the contractor or assignee has the burden "to establish [its] right to the wages or penalties withheld," *id.* § 1733. The Code provides that such a suit "on the contract for alleged breach thereof in not making the payment is the exclusive remedy of the contractor or [its] assignees with reference to those wages or penalties." *Id.* § 1732.

California has recently revised its Labor Code, effective July 1, 2001. See 2000 Cal. Legis. Serv. Ch. 954 (A.B. 1646) (West). Those amendments repeal Sections 1730-1733 (addressing the manner in which withholding may be challenged), and add a new Section 1742, which entitles both prime contractors and subcontractors to challenge a notice of assessment regarding failure to pay the prevailing wage through administrative proceedings, with a right of judicial review.

2. Respondent is a fire-protection firm that has worked as a prime contractor or subcontractor on a number of California public works projects. The Division of Labor Standards Enforcement concluded that respondent had, as subcontractor on three such projects, failed to pay its employees the required prevailing wages. The Division issued notices to the contracting agencies on those projects directing them to withhold payments from the prime contractors pursuant to Labor Code Section 1727. The prime contractors in turn withheld at least $120,000 from respondent. Pet. App. A23.

Respondent filed a complaint in federal district court against the California Labor Commissioner and other public officials and state agencies. The complaint alleged that, by issuing notices directing contracting agencies to withhold money from prime contractors on the affected projects, petitioners deprived respondent of a property interest without due process of law. Respondent sought declaratory and injunctive relief. Pet. App. A90-A106. The district court granted respondent's motion for summary judgment, holding that the pertinent provisions of the California Labor Code violate respondent's due process rights. *Id.* at A86.

3. The court of appeals affirmed that holding. Pet. App. A14-A48. The court first rejected petitioners' argument that respondent had failed to satisfy the causation and redressability elements of standing. The court found the causation element satisfied because, in its view, the State's action "targeted" respondent and "the prime contractors' only role in the dispute is that of a conduit." *Id.* at A26. The court also concluded that respondent's injury in any event "can be directly traced to the state's conduct" in issuing the notices that caused contracting agencies to withhold payments from prime contractors, and prime contractors to withhold payments from respondent. See *id.* at A28. The court further found that injury to be redressable because, if respondent prevails, withheld money must be released to prime contractors "who will be obligated by contract to pay it to [respondent]." *Ibid.*

Turning to the due process issue, the court of appeals found that respondent had a constitutionally protected property interest "aris[ing] from its public works contract * * * in being paid in full for the construction work it has completed." Pet. App. A30. And the court found that the withholding of payments from prime contractors had caused respondent to be deprived of that "interest in full payment for services rendered." *Ibid.* According to the court of appeals, the State's procedures were unconstitutional because

they afforded respondent no pre-deprivation or prompt post-deprivation hearing at which it could challenge the withholding. In particular, the court concluded that, under California law, subcontractors "are not given the right to bring suit," *id.* at A22, and thus "have no opportunity to be heard" on whether the violations occurred, *id.* at A36. In reaching that conclusion, the court did not rely on California state court decisions. It instead relied on its own construction of the relevant statutes, rejecting petitioners' contention that California law provides subcontractors with means of redress. *Id.* at A36-A37 & n.9.

Judge Kozinski dissented. The State, he explained, had included a prevailing-wage requirement as a term of its contracts. Pet. App. A48. When the State concluded that the prevailing-wage term had been breached, it was entitled—like any other contracting party—to withhold progress payments for that failure of performance. *Id.* at A49-A50. Nor had the State deprived respondent of a means through which it could challenge the withholding. Respondent, Judge Kozinski concluded, could sue the contract-awarding body under a theory of equitable subrogation. *Id.* at A50.

4. Following the court of appeals' decision, this Court decided *American Manufacturers Mutual Insurance Co.* v. *Sullivan*, 526 U.S. 40 (1999). *Sullivan* concerned the constitutionality of a Pennsylvania workers' compensation statute that authorized insurers to withhold payments for the treatment of work-related injuries pending independent review of whether the treatment was "reasonable" and "necessary." *Id.* at 44-47. This Court held that a private insurer's decision to withhold payment for a disputed medical treatment pending review did not constitute action "under color of state law" covered by 42 U.S.C. 1983. See 526 U.S. at 49-58. The Court also held that the procedure permitting withholding did not violate due process. The Pennsylvania law did not give employees an unconditional right to payment for medical treatments, but rather made payment conditional on

the employee "establish[ing]" that the treatment was "reasonable and necessary." *Id.* at 60-61. Accordingly, the Court held, employees who are temporarily denied payment pending an inquiry into reasonableness and necessity were not deprived of anything in which they had a protected property interest.

This Court then granted a petition for a writ of certiorari in this case, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *Sullivan*. 526 U.S. 1061 (1999). On remand, the court of appeals reinstated its judgment and opinion, declaring that this Court's *Sullivan* decision was "fully consistent" with its analysis. Pet. App. A3. With regard to state action, the court noted that *Sullivan*'s holding pertained to actions "carried out by a private insurer exercising its discretion in a way permitted by State law." *Id.* at A6. In this case, the court stated, the withholding of money was "specifically directed by State officials in an environment where the withholding party has no discretion at all," and respondent's complaint had "directly attack[ed] the notices of withholding issued by the state agency." *Id.* at A6-A7.

The court of appeals also distinguished *Sullivan*'s due process analysis. The court of appeals declared that its prior opinion in fact was predicated on a theory that this Court had "preserved" in footnote 13 of *Sullivan*. In that footnote, the Court declined to address (as waived) the argument that employees might have "a property interest in their claims for payment, as distinct from the payments themselves," such that the State might be precluded from "finally reject[ing] their claims without affording them appropriate procedural protections." 526 U.S. at 61 n.13. In this case, the court of appeals stated, respondent had a property right in its "claim for payment." Pet. App. A5-A6; see *id.* at A6 (respondent does "not have a right to payment of the disputed funds pending the outcome of whatever kind of hearing would be afforded"). There was a due process violation

here, the court declared, not because respondent was denied immediate payment, but because "the California statutory scheme afforded no hearing at all when state officials directed that payments be withheld." *Ibid.*

Judge Kozinski dissented again, finding the majority's new opinion irreconcilable with *Sullivan*. Pet. App. A7-A13. Under *Sullivan*, Judge Kozinski maintained, there is no state action here, because the California Labor Code leaves prime contractors "free to pay [respondent] the full amount specified by the contract," even if the contracting agency withholds payments from the prime contractor. *Id.* at A8. *Sullivan*, in his view, also precludes respondent from claiming a property interest. Just as Pennsylvania employees could have no property interest in payment for treatments not yet shown to have been "reasonable" and "necessary," respondent in this case could have no protected property interest in payment for work not shown to have satisfied "the contractual condition that it be completed in accordance with prevailing wage requirements." *Id.* at A11.

Judge Kozinski also rejected the majority's reliance on the proposition that respondent had been deprived of a protected property interest in its claims for payment, as distinct from the payments themselves. Even if respondent had a property interest in claims for payment, he explained, the majority's judgment amounted to "premature remediation," because respondent had not been finally deprived of any such claim. Pet. App. A11. The reason such claims had not been adjudicated, Judge Kozinski noted, is that respondent had not attempted to assert them. Until such time as it was clear that respondent could exercise none of several possible options, he stated, "it simply cannot be said that the state has 'finally reject[ed]'" respondent's "claims without affording [it] appropriate procedural protections." *Id.* at A13.

SUMMARY OF ARGUMENT

I. A. Respondent has no constitutionally protected property interest in payment under its public works contracts. California's Labor Code makes it clear that a condition to respondent's right to full payment is compliance with all contractual requirements, including payment of the prevailing wage; that, in cases of dispute, payment will be withheld pending a resolution; and that, in such cases, respondent has the burden of proving compliance. In this case, respondent has not yet shown that it complied with the prevailing-wage requirement. As a result, its right to full payment under its contracts has yet to attach, and the withholding of payments does not deprive respondent of anything to which it is entitled.

Ordinary contract principles lead to the same result. In continuing contracts, performance by one party is a constructive condition of the other party's obligation to pay. In this case, respondent voluntarily entered into an agreement that, among other things, required it to pay prevailing wages and prove its compliance if a dispute arose. Because respondent's performance in conformity with those terms is a constructive condition of the obligation to pay, neither the State's asserted payment obligation nor respondent's asserted right to payment has yet attached. Indeed, as a historical matter, parties claiming a right to payment on a contract have been remitted to a lawsuit—a breach-of-contract action—in which they must prove entitlement to payment. No more process is due simply because one party to the contract is the government.

Respondent, moreover, effectively is seeking to prevent the State from exercising its bargained-for contractual self-help right to withhold payments from prime contractors for breach of the prevailing-wage requirement, simply because prime contractors might, in turn, withhold payments from subcontractors like respondent. Nothing in the Constitution

precludes a State from bargaining for and obtaining in its commercial contracts the same sort of payment withholding rights that private parties may include in their contracts. Nor is the State's right to enforce such contract conditions limited when it establishes them by statute. Those who find the terms demanded by the State undesirable are free to avoid contracting with the State, or to demand greater compensation as the price of agreement.

B. Respondent likewise has not been deprived of a property interest in a "claim" for payment. Respondent has not submitted a claim and had it rejected; respondent instead never submitted a claim of any variety. As a result, it is difficult to conclude that respondent has suffered a deprivation of any claim it may have. Indeed, although the Ninth Circuit decided that California provides no mechanism through which respondent can assert its alleged claim for payment, respondent may well be able to present any such claim through state processes and, upon proving compliance, convert it into a right to payment.

In any event, to the extent the scope of available remedies under California law is unclear, declaratory and injunctive relief was inappropriate. This Court repeatedly has emphasized that federal courts should not decide federal constitutional questions that depend on uncertain forecasts regarding the meaning of state law. Abstention or certification to the state supreme court would have been appropriate in these circumstances; deciding the case based on questionable assumptions about California law was not.

II. In addition to showing deprivation of a property interest, respondent must show that the deprivation was fairly attributable to the State. To the extent California law leaves decisions on whether to withhold payments from a subcontractor to the business discretion of the prime contractor, respondent cannot show state action. The fact that the State has authorized private parties to employ traditional self-help remedies like withholding disputed payments does not

convert the essentially private exercise of that right into state action. To the extent the State compels prime contractors to withhold payments from subcontractors, however, state action is present.

ARGUMENT

I. RESPONDENT HAS NOT ESTABLISHED A VIOLATION OF ITS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS

Because the "requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property," *Board of Regents* v. *Roth*, 408 U.S. 564, 569 (1972), the "first inquiry in every due process challenge is whether" the interest asserted by the plaintiff, and that was allegedly subject to deprivation, constitutes "a protected interest in 'property' or 'liberty'" within the meaning of the Due Process Clause. *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 59 (1999). The court of appeals identified two different property interests here—first, respondent's supposed right to full payment under its contracts, and second, its "claim" for full payment. As to the first, respondent has no present property interest. As to the second, respondent has not established a deprivation.

A. Respondent Has No Constitutionally Protected Property Interest In Full Payment Under Its Public Works Contracts

Consistent with the allegations in respondents' complaint, the court of appeals initially concluded that respondent had a "property interest in being *paid in full* for the construction work it ha[d] completed," declaring that such an interest "ar[ose] from [respondent's] public works contract." Pet. App. A30 (emphasis added). See *id.* at A98 (complaint's allegation that respondent was "deprived of property in the form of substantial sums of money" under its contracts).

That conclusion is impossible to reconcile with the relevant California statutes, is contradicted by respondent's contracts, and is inconsistent with general contract principles.

1. In *Sullivan*, this Court considered whether Pennsylvania's workers' compensation statute created a Fourteenth Amendment "property interest" in payment for the treatment of work-related injuries. 526 U.S. at 44. Under that law, employers and their insurers were required to pay —and employees were correspondingly entitled to payment for—the cost of reasonable and necessary treatments for such injuries. *Ibid.* Pennsylvania law, however, provided that insurers wishing to dispute the reasonableness or necessity of treatments (and thus their obligation to pay) could request review by a utilization review organization, and withhold payment pending that review. See *id.* at 45-46. The plaintiffs in *Sullivan* argued that permitting such withholding of payment denied the employees, without due process, a state-created property interest in payment for the treatment of their work-related injuries. *Id.* at 59-60.

This Court rejected that argument. The Pennsylvania law not only conditioned the plaintiffs' right to payment on "reasonableness" and "necessity," but also expressly provided that, in disputed cases, reasonableness and necessity had to be established before the insurer's payment obligation would attach. 526 U.S. at 58-61. The Court explained:

> Under Pennsylvania law, an employee is not entitled to payment for *all* medical treatment once the employer's initial liability is established * * *. Instead, the law expressly limits an employee's entitlement to "reasonable" and "necessary" medical treatment, and requires that disputes over the reasonableness and necessity of particular treatment must be resolved *before* an employer's obligation to pay—and an employee's entitlement to benefits—arise. * * * Thus, for an employee's property interest in the payment of medical benefits to attach under state law, the employee must clear two hurdles: First, he must prove that an employer is liable for a work-related injury, and second, he must establish that the particular medical treatment at issue is reasonable and necessary.

Id. at 60-61. The Court concluded that, because the plaintiffs in *Sullivan* had yet to clear the second hurdle—"to make good on their claim that the particular medical treatment they received was reasonable and necessary"—they lacked "a property interest in" payment and could not assert a due process claim for the deprivation thereof. *Id.* at 61.

The California laws at issue in this case similarly make it clear that respondent has no unconditional entitlement to full payment. California law generally makes full performance of all material obligations on a public works project, including compliance with prevailing-wage requirements, a condition precedent to the right to receive full payment. See, *e.g.*, Cal. Pub. Cont. Code §§ 7107(c), 9203 (West Supp. 2000); Cal. Lab. Code § 1775(b)(4) (West Supp. 2000) (before "making final payment to the subcontractor * * * the contractor shall obtain an affidavit * * * from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages"). And California law provides that, if the contracting body or the State concludes that the prevailing-wage requirement has not been met, then "*[b]efore* making payments to the contractor," the contracting body "shall withhold and retain" from any such payments the amount by which workers have been underpaid and any penalties. Cal. Lab. Code § 1727 (emphasis added). California law further provides that, if the State withholds payment from a prime contractor because of a subcontractor's failure to pay prevailing wages, the prime contractor is authorized, *before* making payment, "to withhold from [the] subcontractor under him sufficient sums to cover any penalties withheld from him * * * on account of the subcontractor's

failure to comply." *Id.* § 1729. Finally, California law provides that, if the contractor (or its assignee) wishes to contest the withholding, it must bring a breach of contract action, and that it bears the burden in that action of proving full compliance and thus "establish[ing] [its] right to the wages or penalties withheld." *Id.* § 1733.

Thus, just as the employees in *Sullivan* were not entitled to full payment for the medical treatments unless they were "reasonable" and "necessary," 526 U.S. at 61, respondent is not entitled to full payment on its subcontracts unless it fully complies with California's prevailing-wage requirement. Just as the Pennsylvania law in *Sullivan* "require[d] that disputes over the reasonableness or necessity of particular treatment * * * be resolved *before* an employer's obligation to pay—and an employee's entitlement to benefits—ar[o]se," *ibid.*, so too California law requires that disputes over respondents' compliance with the prevailing-wage law be resolved *before* the contracting body's and the prime contractor's obligations to pay (and thus respondent's right to be paid) arise. And, just as the employees in *Sullivan* had yet to prove their entitlement by establishing reasonableness and necessity, respondent here has yet to make good on its claim that it complied with the prevailing-wage law that is a condition to final payment. See Pet. App. A11 (Kozinski, J., dissenting).

2. Respondent in any event does not contend that California statutory law provides it with a property interest in full payment. Instead, respondent contends—and the Ninth Circuit in its now-reinstated pre-*Sullivan* opinion held—that respondent's *contracts* with prime contractors provided respondent with a property interest. See Pet. App. A30 (respondent's "interest arises from its public works contract"). But neither respondent nor the court of appeals identified the relevant contractual provisions giving rise to that alleged property right. It is difficult to see how respondent could claim (and the Ninth Circuit could find) the deprivation of a property right arising from a contract without reference to the terms and conditions of the contract itself.

Besides, it is well established that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 20 n.17 (1977) (quoting *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 429-430 (1934), and *Von Hoffman* v. *City of Quincy*, 71 U.S. (4 Wall.) 535, 550 (1867)).[3] Consequently, as a matter of law, the relevant portions of California's labor statutes are part of respondent's contracts. And as explained above, those statutes preclude respondent from claiming an unqualified right to full and final payment from the prime contractor, since they make respondent's compliance with the prevailing-wage law a condition precedent to its right to receive full payment, and authorize the withholding of payment in disputed cases until respondent has established entitlement. Moreover, in this case, the Ninth Circuit did not disagree with petitioners' contention that "the withholding procedure" respondent challenges as depriving it of property "is contained in" respondent's subcontracts, Pet. App. A31, and it noted respondent's "conce[ssion] that the express terms of the contract grant the state the authority to withhold funds for wage violations," *id.* at A32.[4] Surely respondent cannot claim that it has a

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[3] See also *Ogden* v. *Saunders*, 25 U.S. (12 Wheat.) 213, 259-260, 297-298 (1827) (opinions of Washington and Thompson, JJ.). That principle is well accepted both as a matter of standard contract law, 11 R. Lord, *Williston on Contracts* § 30:19, at 203-204 (4th ed. 1999), and as a matter of California law, *City of Torrance* v. *Workers' Compensation Appeals Bd.*, 185 Cal. Rptr. 645, 648 (1982).

[4] See Pet. App. A32 (withholding provisions "incorporated by state law into all public works contracts"); *id.* at A22 (Sections 1771, 1727, 1729, and 1775 "must be incorporated into all public works contracts"). See also Cal. Lab. Code § 1775(b)(1) (West. Supp. 2000) (for prime contractor to avoid penalties for subcontractor's failure to pay prevailing wage, it must

protected property right to full payment under its contracts where those very contracts permit prime contractors to withhold the payments; as in *Sullivan*, "[t]o state the argument is to refute it." 526 U.S. at 61.

3. Respondent's claim that it has a protected property right in payment under its subcontracts, moreover, cannot be reconciled with general principles of contract law. It is by now well settled that one party's fulfillment of its obligations under a contract is a constructive condition of the other party's obligation to pay. See *Restatement (Second) of Contracts* § 237 cmt. a (1979) ("[A] material failure of performance * * * operates as the non-occurrence of condition" and thus "prevent[s]" the corresponding "performance" of the other party "from becoming due, at least temporarily."); 3A A. Corbin, *Corbin on Contracts* § 708, at 333 (1960) ("If the refusal to pay an installment is justified" by the failure of substantial performance, the unpaid party cannot declare breach.).[5] In this case, after respondent voluntarily agreed to a contract term requiring it to "pay a prevailing wage to [its] employees," the State "determined that [respondent] did not comply with its prevailing wage obligation, and thus withheld payments." Pet. App. A49 (Kozinski, J., dissenting). Because respondent's performance in conformity with

comply with requirement that "[t]he contract executed between the contractor and the subcontractor for the performance of work * * * shall include a copy of the provisions of Sections 1771, 1775, 1776, [and] 1777.5").

[5] This rule repeatedly has been applied in the context of progress payments on construction contracts. See, *e.g.*, *Howard S. Lease Constr. Co.* v. *Holly*, 725 P.2d 712 (Alaska 1986) (contractor entitled to withhold amount of back charge for fine grading, which had been contractual obligation of subcontractor, from progress payments); *Morgan* v. *Singley*, 560 S.W.2d 746 (Tex. Civ. App. 1977) (affirming finding that defective performance of subcontractor justified withholding of payment); *Bart Arconti & Sons, Inc.* v. *Ames-Ennis, Inc.*, 340 A.2d 225 (Md. 1975) (affirming finding that withholding was justified where subcontractor breached contract); *K & G Constr. Co.* v. *Harris*, 164 A.2d 451 (Md. 1960) (subcontractor's negligent operation of heavy equipment a material breach justifying suspension of progress payments).

that term (and in cases of dispute, proof of performance) was a constructive condition of the obligation to pay, the withholding did not deny respondent a property right guaranteed by the contract. See *Sullivan*, 526 U.S. at 57 (noting traditional rule that, although one can "become liable * * * if the refusal to pay breached the contract," the "obligation to pay would only arise after" the claimant had "initiated a claim and reduced it to a judgment").

In that respect, the State's withholding of payment here is "no different from a builder's refusal to make progress payments" on any other commercial construction contract "when he discovers (or believes he has discovered) a failure of performance on any other term." Pet. App. A49 (Kozinski, J., dissenting). Where a private builder refuses to pay because of an alleged breach, the party claiming injury is generally remitted to a lawsuit, in which it must prove performance and entitlement to payment. We see no reason why the Constitution should forbid a similar approach in the context of voluntarily undertaken commercial construction contracts, like those at issue here, merely because they concern public works.[6]

4. For the same reasons, even if there were a constitutionally protected interest in payment, there is no due process violation so long as the State provides some form of post-deprivation process, in the form of a breach of contract action or otherwise. At common law, the only remedy for

[6] Because respondent's entitlement to payment has not been legally established, the court of appeals' reliance (Pet. App. A30) on *Sniadach* v. *Family Fin. Corp.*, 395 U.S. 337 (1969), was misplaced. In *Sniadach*, the State permitted third-party creditors to garnish employee wages. Because the employee had already become entitled to payment from the employer—garnishment effectively intercepts payments that not only have been earned by the employee, but that the employer in fact is making to the employee—the procedure did deprive the employee of a present property interest in payment. Here, in contrast, respondent has not established entitlement to payment under its contracts, and it is for that very reason that the payor itself has chosen to withhold payment.

breach of contractual obligations was a suit for monetary compensation, 3 E.A. Farnsworth, *Farnsworth on Contracts* § 12.4, at 159 (1990), and the suit for such a judgment is still "usually regarded as adequate to satisfy the requirements of justice," 5A A. Corbin, *supra*, § 1139, at 111 (1964). Thus, courts generally will not grant other relief for breach of contract if a suit for monetary relief is adequate. See *Restatement (Second) of Contracts*, *supra*, § 359. See also *United States* v. *Winstar Corp.*, 518 U.S. 839, 885 (1996) (opinion of Souter, J.) ("[D]amages are always the default remedy for breach of contract."); *Thompson* v. *Railroad Cos.*, 73 U.S. (6 Wall.) 134, 137 (1867) (suit in equity barred where "an action at law * * * to recover damages for a breach of contract" would have permitted "the railroad companies to collect their debt"). Thus, even in clear cases of breaches of contractual rights, historical practice has been to remit the party claiming breach to a suit seeking compensation after the fact. There is no reason why the Constitution should require any more process for parties who voluntarily enter into a commercial contract with the government. Thus, for example, Congress—although providing a specialized forum and waiver of immunity for breach-of-contract suits against the United States under the Tucker Act, 28 U.S.C. 1346, 1491—still largely precludes relief other than monetary compensation after a breach has occurred. See *United States* v. *Testan*, 424 U.S. 392, 397-398 (1976); *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575-577 (1867).[7]

That rule is especially sound here, since respondent does not so much seek to prevent the State from breaching a contractual obligation as it attempts to preclude the State from exercising its own bargained-for contract rights. When

[7] Indeed, before the Tucker Act, a contractor seeking to recover on a breach-of-contract claim against the United States had no automatic right to a judicial forum, and was remitted instead to seeking a private bill. See *OPM* v. *Richmond*, 496 U.S. 414, 430-431 (1990).

prime contractors enter into public works projects in California, they undertake an obligation to ensure that all workers on the project are paid the prevailing wage. See Cal. Lab. Code §§ 1771, 1774. Thus, when project employees are not paid that wage—whether the employees are the prime contractor's or those of its subcontractor—the prime contractor is contractually obligated to pay them the difference itself. See *id.* § 1775 (West 1989) ("The difference between the prevailing wage rates and the amount paid to each worker * * * shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.") (pre-1998 statute); *id.* § 1775(a) (West Supp. 2000) (same, but payment must be made by prime contractor or subcontractor); *id.* § 1775(d) (West Supp. 2000) (prime contractor jointly and severally liable for nonpayment). And, if the prime contractor fails to do so, the State has a right to withhold payment to the prime contractor on account of that breach. See *id.* §§ 1727, 1775. We fail to see how the State's enforcement of its bargained-for contractual right—to withhold payment on account of the prime contractor's breach of an obligation to ensure that *all* project employees are paid the prevailing wage—could conceivably violate the subcontractor's constitutional rights.

Perhaps recognizing as much, the Ninth Circuit attempted to recharacterize this suit as a challenge to the State's exercise of its "regulatory power," because California law mandates inclusion of the prevailing-wage requirement and the withholding provisions in all of the State's public works contracts. Pet. App. A32. But the fact that the State has statutorily established the terms on which it is willing to enter into commercial contracts for public works (rather than leaving the terms to the discretion of individual state contracting bodies) does not make a constitutional difference. Private parties too may declare in advance certain contract conditions that are not subject to negotiation. In

either event, those who find the required conditions undesirable can decline to contract or insist on greater compensation. *Id.* at A49, A51 (Kozinski J., dissenting). As this Court explained in upholding a similar statutory scheme almost a century ago, "we can imagine no possible ground to dispute the power of the State to declare that no one undertaking work *for it*" must undertake particular obligations, for it is not "part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State." *Atkin* v. *Kansas*, 191 U.S. 207, 222 (1903). Instead, each State has the unquestioned power "to prescribe the conditions upon which it will permit public work to be done on its behalf * * *. No court has authority to review its action in that respect." *Id.* at 222-223. Accord *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940) ("Like private individuals and businesses, the Government enjoys the unrestricted power * * * to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."). In this case, respondent voluntarily chose to enter into a contract containing the terms and conditions the State requires for all public works contracts. Having done so, respondent cannot complain that it has been deprived of a contract-based property right to full payment where the contract itself simply does not provide that right.[8]

[8] This case does not implicate the Court's previous rejection of the principle that, "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant * * * must take the bitter with the sweet" for due process purposes. *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 540 (1985) (quoting *Arnett* v. *Kennedy*, 416 U.S. 134, 153-154 (1974) (plurality opinion)). For one thing, this case does not involve the distribution of entitlements or statutory benefits, nor the provision of state jobs to individuals; instead, it concerns construction contracts for public works, an area in which the State traditionally has had greater discretion to establish the terms under which it is willing to do business. See *Atkin*, *supra*; *Lukens Steel*, *supra*.

More fundamentally, recognizing that a property interest in actual receipt of a payment does not "attach under state law," *Sullivan*, 526 U.S. at 60, until the claimant's entitlement thereto has been determined through State-specified procedures is not an invocation of the bitter-with-the-sweet principle. In *Sullivan*, this Court recognized that no property interest in the receipt of even a statutory benefit can arise until the claimant's entitlement to the benefit has been established. *Id.* at 60-61. Before the State has satisfied itself of an individual's entitlement to a benefit, the individual has at most a mere "unilateral expectation" of receiving it, which does not constitute "property." *Roth*, 408 U.S. at 577. By contrast, an individual's expectation of *continued* receipt of a benefit to which the State has already found him or her entitled may constitute a reasonable, non-unilateral reliance interest of the sort "upon which people rely in their daily lives," and which "[i]t is a purpose of the ancient institution of property to protect." *Ibid.* See also *Sullivan*, 526 U.S. at 60 (respondents' property interest was "fundamentally different" from those involved in cases in which the individuals' "entitlement to benefits had been established," and which involved the procedures necessary in connection with terminating the "*continued* payment of benefits"); *Gilbert* v. *Homar*, 520 U.S. 924, 928 (1997). In this case, standard contract principles condition respondent's right to receive full payment on its full performance; because respondent failed to perform as required, its right to receive the corresponding full payment never matured.

B. The State Has Not Deprived Respondent Of Any Property Interest In Claims For Withheld Payments

Following this Court's grant, vacatur, and remand of the Ninth Circuit's initial decision in light of *Sullivan*, see pp. 6-7, *supra*, the Ninth Circuit identified a different property interest. Although the Ninth Circuit reinstated its earlier opinion, it acknowledged that respondent does not "have a right to payment of the disputed funds pending the outcome of whatever kind of hearing would be afforded to determine whether [respondent] complied with the California prevailing wage laws." Pet. App. A6. But it concluded that respondent had a property interest in a "claim" for payment. *Ibid.* The Ninth Circuit explained that this Court, in *Sullivan*, 526 U.S. at 61 n.13, had reserved judgment on whether plaintiffs could have a property interest in their claims for

benefits, as distinguished from the benefits themselves, "such that the State, the argument goes, could not finally reject their claims without affording them appropriate procedural protections."

1. As we explained in our brief as amicus curiae in *Sullivan* (97-2000 U.S. Br. at 21-22), an individual who has applied for statutory benefits, but who has not yet received a determination of entitlement, may well enjoy a constitutionally protected property interest in his or her *claim* for benefits (so long as the statute providing the benefits remains in effect), even though he or she has no protected interest in the immediate receipt of the benefits themselves. Such a claim for payment is akin to a "chose in action," which may be a species of property. See, *e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982); see *Shvartsman* v. *Apfel*, 138 F.3d 1196, 1199 (7th Cir. 1998) (discussing *Zimmerman*). Thus, state action bringing about the final and irrevocable denial of the claim for the benefit—as distinguished from regulating the individual's access to the benefit in a manner that does not destroy the value of the claim altogether—is subject to due process scrutiny.

We do not believe, however, that invocation of such a property interest supports the Ninth Circuit's judgment here. This is not a case in which a party actually filed a claim of some variety—or a lawsuit—only to have it rejected arbitrarily or adjudicated through unfair procedures. Pet. App. A11 (Kozinski, J., dissenting) (contrasting *Logan*, 455 U.S. 422). Instead, respondent has yet to file a claim of any variety; nor has respondent established the absence of a practicable forum to which such a claim could be submitted. Under these circumstances, it cannot be said that the State has deprived respondent of a "claim" for payment.

The Ninth Circuit appears to have assumed that respondent need not submit a claim for payment through state processes because California has not provided a mechanism by which such claims may be adjudicated. But Section 1733

of the California Labor Code provides a specialized breach-of-contract action through which the prime "contractor *or [its] assignee*" may challenge withholding and obtain funds mistakenly withheld. Cal. Lab. Code § 1733 (emphasis added). Respondent nowhere alleges that it sought an assignment from the prime contractor to permit it to bring suit under Section 1733. Pet. App. A12-A13 (Kozinski, J., dissenting). Nor does respondent explain why a prime contractor that withheld payments from its subcontractor would resist such an assignment.[9] Indeed, respondent nowhere claims that such assignments are difficult to obtain, or that respondent cannot protect itself from the prospect of a refusal to assign by requiring assignment as a condition of its contracts. Finally, it is far from clear that state courts would refuse to require an express assignment in the event that a prime contractor unreasonably refused to assign the right, or effect an "equitable assignment" through the doctrine of subrogation.[10] It is difficult to credit the contention that respondent's purported "claim" for payment has been unlawfully extinguished when respondent does not allege that it has made any effort to assert it.

Moreover, the Ninth Circuit assumed—without citation to California case law—that Section 1732 makes Section 1733

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[9] Respondent observes that a prime contractor subjected to withholding that has in turn withheld payments from a subcontractor "has no financial incentive to contest the" State's "action." Br. in Opp. 16. By the same token, however, such a prime contractor loses nothing by assigning the right to sue to its subcontractor, and presumably would be willing to do so in order to preserve its relationship with its contracting partner, as well as its reputation in the industry, and to avoid the prospect of a breach-of-contract action for unreasonably withholding assignment (see p. 23, *supra*) or for failing to make final payment (see p. 24 & note 12, *infra*).

[10] Federal courts could not effect such an equitable assignment of rights against the federal government under the Tucker Act. The Tucker Act strictly limits the causes of action that may be brought, and subrogation suits are not among those listed. See, *e.g.*, *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255 (1999).

the exclusive remedy for any person seeking to challenge withholding. Pet. App. A22. But Section 1732 makes suit under Section 1733 "the exclusive remedy *of the [prime] contractor or [its] assignees*," Cal. Lab. Code § 1732 (emphasis added), and thus does not, by its terms, preclude suit by a subcontractor that has not obtained an assignment of the prime contractor's rights. See *J & K Painting Co.* v. *Bradshaw*, 53 Cal. Rptr. 2d 496, 500 (Ct. App. 1996). For that very reason, at least one California appellate court has permitted a subcontractor to bring a challenge through a writ of mandate under Cal. Civ. Proc. Code § 1085. *J & K Painting Co.*, 53 Cal. Rptr. 2d at 499-501.[11] Finally, the Ninth Circuit's conclusion that the Labor Code would preclude the subcontractor from bringing a common-law breach-of-contract action against the prime contractor (Pet. App. A28, A37 n.9) is not a self-evidently correct reading of California law.[12] Thus, given the general reluctance of California courts to read legislation as providing only a "patently inadequate" remedy, *J & K Painting*, 53 Cal. Rptr. 2d at 501 n.7, there is reason to doubt that respondent lacks any mechanisms through which it may assert a "claim" for payment.

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[11] As the petition explains (at 6), a subcontractor also could seek to recover withheld payments under California's statutory "stop notice" procedure. See Cal. Civ. Code § 3210 (West 1993); *Department of Indus. Relations* v. *Fidelity Roof Co.*, 70 Cal. Rptr. 2d 465, 470 (Ct. App. 1997).

[12] The Ninth Circuit read Section 1729 of the California Labor Code as providing prime contractors with an absolute defense against such actions. Pet. App. A28, A37 n.9. By its terms, however, Section 1729 makes it "lawful" for a prime contractor to withhold payments from a subcontractor where sums have been "withheld from [the prime contractor] by the awarding body *on account of the subcontractor's failure to comply*" with prevailing-wage requirements. Where the subcontractor in fact has complied with those requirements, withholding by the State could be regarded as not "on account of the *subcontractor's failure* to comply," but rather on account of the *State's mistake* regarding compliance, and the prime contractor's failure—by neither challenging the error itself nor assigning the right to do so—to seek a correction.

For present purposes, however, it is sufficient to note that the burden is on respondent to establish a violation of its due process rights, and that respondent has failed to carry that burden. Simply put, any violation of respondent's rights would not be complete until the State has both deprived respondent of its interest in "property," and the process that is respondent's due has been denied. Cf. *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 193-195 (1985). Here, respondent cannot argue that either has occurred with respect to its purported property interest in a claim for payment. There has been no deprivation of any such interest because the claim has yet to be asserted in any state forum, much less rejected or terminated by the State. And, although state law in this area is not certain, respondent may well be able to present its claim through state processes and, upon proving compliance, convert that claim into the payment that is its ultimate goal. Only if respondent makes an effort to do so and is rebuffed, or has affirmatively established that no procedure is available, will it be possible to conclude with assurance that respondent has been deprived of any claim for payment it may have, and that any such deprivation occurred without the process that is constitutionally due. That respondent has not done.

2. There is an additional infirmity in the court of appeals' reliance on suppositions regarding California law to invalidate this important statutory scheme. As this Court explained over half a century ago, "important considerations of policy in the administration of federal equity jurisdiction" weigh against federal court relief against state action on constitutional grounds where the ultimate holding rests on a "forecast" as to how state courts would resolve particular questions of state law. *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496, 499-501 (1941). Indeed, this Court repeatedly has relied on the strong federal interests in avoiding "unnecessary friction" in federal-state relations, preventing interference with "important state functions," and avoiding both

"tentative decisions on questions of state law" and "premature constitutional adjudication" as grounds for refusing federal decision on constitutional questions where the state laws in question are "fairly subject to an interpretation which w[ould] render unnecessary or substantially modify the federal constitutional question." *Harman* v. *Forssenius*, 380 U.S. 528, 534, 535 (1965). See, *e.g.*, *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 305-312 (1979); *Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498, 510-513 (1972).

To the extent state law regarding the availability of remedies is unclear, this is precisely the sort of case in which *Pullman* abstention is appropriate, since any decision invalidating California's statutory scheme would necessarily rest on the questionable "forecast" that no state remedies exist. The court of appeals in this case nonetheless invalidated a prevailing wage enforcement scheme that has been in place in California for over 60 years. In so doing, the court took at face value respondent's assertions as to the meaning of the California Labor Code §§ 1729, 1732, and 1733, see Pet. App. A22, A28, A37 n.9; relied on the very *absence* of controlling judicial precedent as a basis for concluding that respondent had no available remedies under state law, see *id.* at A37 n.9; and disregarded the position of the state agency responsible for enforcing the Labor Code that other remedies were available. See generally pp. 22-24 & notes 11-12, *supra*. This Court itself has abstained in such circumstances. See *Carey* v. *Sugar*, 425 U.S. 73 (1976) (per curiam) (abstaining in procedural due process challenge to state prejudgment attachment statute, noting that injunctive relief was "particularly inappropriate" in light of state officials' claim that state law made available procedures of the sort the plaintiffs demanded).

Nor did the court of appeals consider the ordinary alternative to *Pullman* abstention, which is certification of the relevant state law questions to the state supreme court. See California Rules of Court 29.5(a); *Arizonans For Official*

English v. *Arizona*, 520 U.S. 43, 76 (1997). Invocation of that procedure would have been superior to premature adjudication of a federal constitutional question (and invalidation of an important state statute) based on what may have been an inappropriately parsimonious construction of the relevant state laws. Moreover, we note that California has recently revised its Labor Code, effective July 1, 2001, to add a new Section 1742, which entitles both prime contractors and subcontractors to challenge a notice of assessment of unpaid wages through administrative proceedings, with a right of judicial review. See p. 4, *supra*. That new provision will eliminate (as of its imminent effective date) any basis for the court of appeals' belief that a subcontractor like respondent has no means of challenging the State's withholding of payments from a prime contractor, where the prime contractor in turn withholds payments from the subcontractor.

For the foregoing reasons, if this Court does not reverse the judgment of the court of appeals, it may wish to consider vacating that court's judgment and remanding with directions to dismiss the case, in view of the absence of any significant continuing justification for an award of prospective equitable relief, and the presence of uncertain questions of state law that would otherwise appear to call either for *Pullman* abstention or for a certification to the California Supreme Court that probably could not be completed before the new law becomes effective on July 1, 2001.

II. THE COURT OF APPEALS' STATE ACTION ANALYSIS IS UNPERSUASIVE

In order to state a claim for the deprivation of a right protected by the Fourteenth Amendment, respondent must establish "state action" implicating the due process guarantee. *Sullivan*, 526 U.S. at 49-50. Respondent's primary contention is that it suffers injury when prime contractors withhold final payments from respondent under its public works contracts. According to petitioners, however, Section

1729 of the California Labor Code permits but does not compel prime contractors to withhold those payments; prime contractors, petitioners therefore argue, are not properly characterized as "state actors." To the extent that description of prime contractors' discretion is correct, we agree. As this Court explained in *Sullivan*, the fact that the State has authorized private parties (like the prime contractors here) to employ traditional self-help remedies (such as withholding disputed payments) "without participation by any public official" does not itself convert essentially private conduct into state action. 526 U.S. at 57 (quoting *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 162 n.12 (1978)). Nor do we think that *Sullivan* can be meaningfully distinguished on the ground that, in this case, respondent has sued only state officials, and has challenged their withholding of payments from the prime contractor in the first instance. The conduct of state officials did not injure respondent; the prime contractor's independent decision to withhold payments from respondent did. At least so long as the prime contractor was free to pay respondent notwithstanding the State's action of withholding payment (as the prime contractor might do to ensure respondent's continued performance despite a breach), and so long as the prime contractor was free to withhold payments even if the State did not do so first (as the prime contractor might do in the event of breach), respondent's injury would appear to be properly attributed to the prime contractor's business judgment, not to action of the State. Cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (standing requires the injury to be "fairly traceable" to the defendant's conduct rather than to "independent action of some third party not before the court").

We likewise do not agree with the court of appeals' conclusion that state action exists here because respondent was the "target of the state's action" of withholding payment from prime contractors. Pet. App. A67. Although this Court has left open the possibility that state action could be

established by a plaintiff who is indirectly affected when the government "act[s] against" a third party "for the purpose of punishing or restraining" the plaintiff, *O'Bannon* v. *Town Court Nursing Ctr.*, 447 U.S. 773, 789 n.22 (1980), the operation of Section 1729 does not depend on such a purpose. The State's withholding of payment from the prime contractor is justified by—and designed to redress—the prime contractor's breach of its *own* obligation to ensure that its subcontractors comply; and the State's withholding also serves to isolate project funds that can be used to compensate the underpaid workers on the project, without regard to whether those funds are withheld in the end only from the prime contractor or whether the prime contractor in turn withholds payments from the subcontractor. See Cal. Lab. Code § 1775(b)(2) (West Supp. 2000) (prime contractor obligated to monitor subcontractor's compliance with prevailing wage law); *id.* § 1775(d) (withheld funds paid to undercompensated workers); p. 19, *supra* (prime contractor's obligation to ensure payment).

Nonetheless, there are two provisions of the California Labor Code that might now support a finding of state action. Although Section 1729 of the Labor Code does not require prime contractors to withhold payments from subcontractors —and nothing in the pre-1998 version of the California Labor Code appears to have done so either—an amendment to Section 1775 of that Code, effective January 1, 1998, suggests that California law in fact may *require* prime contractors to withhold payments from subcontractors under certain circumstances. In particular, the currently effective Section 1775(b)(3) of the Labor Code states that, when a contractor becomes aware of a subcontractor's failure to comply with prevailing-wage requirements, "the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, *retaining sufficient funds due the subcontractor* for work performed on the public works project." Cal. Lab. Code 1775(b)(3) (West Supp. 2000) (em-

phasis added). In addition, a new Section 1775(c) provides that, if a subcontractor has not paid the prevailing wage and the contracting agency does not retain sufficient funds to pay those employees the balance of their wages, "the contractor *shall* withhold" from the subcontractor "an amount * * * sufficient to pay those employees the general prevailing rate * * * *if requested* by the Division of Labor Standards Enforcement." *Id.* § 1775(c) (emphasis added). To the extent those provisions are at issue here and compel prime contractors to withhold payments once the State notifies the prime contractor of a subcontractor's noncompliance, we believe that state action is present. As this Court has explained, a State can be held responsible for a private decision when it "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Sullivan*, 526 U.S. at 52 (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982)).

CONCLUSION

The judgment of the court of appeals should be reversed. In the alternative, the Court may wish to vacate the judgment of the court of appeals and remand the case with directions to vacate the judgment of the district court and remand the case to that court with directions to dismiss the complaint for want of a basis for prospective equitable relief in light of the enactment of 2000 Cal. Legis. Serv. Ch. 954 (A.B. 1646) (West), and the presence of uncertain questions of state law.

Respectfully submitted.

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